Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act	)	RM-10865

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION COMMENTS

Albert Gidari
Perkins Coie LLP
505 Fifth Avenue South
Suite 620
Seattle, WA 98104
(206) 359-8688

Michael F. Altschul
Senior Vice President, General Counsel
CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION

1400 16th Street, N.W.,
Suite 600
Washington, D.C. 20036
(202) 785-0081

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SUMMARY

The Cellular Telecommunications & Internet Association ("CTIA") opposes the Joint Petition (the "Petition") of the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, "Law Enforcement") because it seeks to rewrite the Communications Assistance for Law Enforcement Act ("CALEA") and abandon the careful safeguards Congress put in place – with the explicit consent of Law Enforcement – by extending CALEA to the Internet, other private networks and information services, all of which Congress expressly exempted from the law.

CTIA and its members have a long history of cooperation with Law Enforcement that continues today. The industry has created a safe harbor standard that addresses packet-mode communications and provides Law Enforcement with access to the content of the communications and separated delivery of communications identifying information.

Lawful intercept solutions are available today, and carriers are providing Law Enforcement with access to broadband and packet-mode technologies, but CALEA does not apply to these services because broadband access or connectivity to the Internet, and all the applications that ride over it, are within CALEA's information services exemption, which applies regardless of whether the entity providing the service is a telecommunications carrier or a replacement for local exchange service. The Petition not only requests a declaratory ruling that all types of Internet access and other broadband, packet-mode technologies are covered by CALEA, it also proposes an implementation plan that would prevent the introduction of innovative new technologies and services until the government has approved their specifications, and also would require carriers to reengineer the Internet and other private networks within 15 months or less according to specifications the government has yet to disclose. Finally, the Petition seeks to change existing law and the cost recovery rules by shifting the costs for implementing these capabilities to end users. CTIA opposes these requests.

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The Cellular Telecommunications & Internet Association ("CTIA")[1] submits these comments in response to the Commission's Public Notice[2] regarding the Joint Petition of the Department of Justice *et al.* (the "Petition") filed on March 10, 2004.[3] The Petition seeks to have the Commission broadly rewrite the Communications Assistance for Law Enforcement

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] Public Notice, *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA No. 04-700 (Mar. 12, 2004) ("Public Notice").

[3] Joint Petition for Expedited Rulemaking of the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (filed March 10, 2004) ("Petition").

Act[4] ("CALEA") and abandon the careful safeguards put in place by Congress by extending CALEA to the Internet, other private networks and information services – all of which Congress expressly exempted from the law.

Unquestionably, the urgency of our times demands that CTIA and its members cooperate fully with Law Enforcement, and the record will show conclusively that such cooperation has been forthcoming and continues today. Notwithstanding all of our best intentions in supporting the needs of Law Enforcement, the Commission must faithfully apply the law and reject the declaratory relief sought in the Petition as beyond the scope of CALEA. In so doing, the request for a rulemaking will become moot inasmuch as there would be no need for Petitioners' "implementation plan" for these exempt information services.

The Commission should understand that reaching these conclusions does not mean that Law Enforcement will be left without surveillance assistance or solutions. To the contrary, all service providers have a clear duty to cooperate with Law Enforcement in conducting electronic surveillance.[5] The Commission should be well aware of the industry efforts in the creation and deployment of a packet-mode communications standard that provides Law Enforcement with access to the content of the communications and separated delivery of communications identifying information. Industry works with Law Enforcement on a daily basis, implementing thousands of wiretaps and pen register orders, producing hundreds of thousands of phone records (without compensation), and doing extraordinary things in times of emergency.[6] CTIA members remain absolutely committed to working with Law Enforcement to create lawful solutions to surveillance problems.

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[4] Communications Assistance for Law Enforcement Act, P.L. No. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229.

[5] 18 U.S.C. § 2518(4).

[6] The Commission, for example, is no doubt familiar with the extraordinary wireless industry cooperation with Law Enforcement in the investigation and tracking of the Washington, D.C., area sniper.

OVERVIEW

The Petition may be viewed in two parts: (1) a request for a declaratory ruling that Internet access and other broadband, packet-mode technologies are covered by CALEA, and, once so determined,[7] (2) a demand for an implementation plan that would require carriers to reengineer the Internet and other private networks within 15 months or less according to specifications approved by the government. CTIA responds to both points in these Comments.

In response to the request for declaratory ruling, the Commission will need to examine the scope of CALEA's information services exemption. All other questions – and answers – flow from this determination. The Petition takes a different tack and asks the Commission to find that all broadband services are telecommunications, or replacements for such, so that all entities providing telecommunications would be obligated to comply with CALEA. While it is certainly true that only telecommunications carriers have obligations to implement CALEA; CALEA also makes clear that information services are exempt regardless of whether or not a telecommunications carrier provides them, and regardless of whether such services are a replacement for local exchange service.

Thus, the only question for the Commission is whether the term "information services" is ambiguous and subject to Commission interpretation. The term certainly was well-understood by Congress when CALEA was passed to mean those enhanced communications services that combine computing and transmission and it was used in the same way two years later in the Telecommunications Act of 1996.

Indeed, the Commission already has decided as much in its *Second Report and Order* when it stated that it "expect(s) in virtually all cases that the definitions of the two Acts will produce the same results."[8] CTIA agrees with that conclusion. Congress did not create the

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[7] The declaratory relief sought is an untimely reconsideration petition in disguise and should be rejected.

[8] *See In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, ¶ 13 (1999) ("*Second Report and Order*").

concept of information services when it passed CALEA in 1994, but rather it relied on the generally accepted understanding of the term at the time. At the very least, Congress clearly understood that "information services" included Internet access and all the applications that run over it once a connection is established.

The Commission has been on the right track in its broadband inquiries[9] where it seeks to create a unified regulatory regime for broadband based on the functions made available to the end user rather than the facilities used to transport the communication or information.[10] It should stay the course as nothing in CALEA suggests that an alternative, CALEA-specific meaning of "information services" was intended by Congress.[11]

Next, the Petition's proposed implementation plan is untenable and contrary to CALEA. It substitutes the Commission for the courts, creates new standards for extensions, ignores existing industry safe harbors, creates new penalties that Congress did not authorize or contemplate, and assumes all compliance is reasonably achievable by all service providers

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[9] *See In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Broadband Access NPRM*"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Inquiry*"), *aff'd in part and vacated in part sub nom., Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003); *In the Matter of IP-Enabled Services*, FCC 04-28, WC Docket No. 04-36, Notice of Proposed Rulemaking (rel. March 10, 2004) ("*VOIP NPRM*").

[10] *See, e.g., Cable Modem Inquiry* ¶ 35.

[11] CTIA recognizes that if the Petition is denied based on the regulatory classification of the service, it is most probable that Law Enforcement will bear the burden of developing the wiretap solution (as it has done with Carnivore and other such capabilities). But that is the decision that Congress made. Unlike the broadband inquiries under Section 706 of the Communications Act where Congress empowered the Commission to achieve Congress' goal of broadband deployment through regulatory forbearance measures, Congress already has codified the forbearance in CALEA in regard to information services. *See infra* note33. The

regardless of cost or its impact on important privacy rights. While the Commission's implementation of E-911 might be one model that could be followed if the Commission had the authority to set up such procedures, the framework for implementation of CALEA was established by Congress in 1994 and those are the procedures that the Commission must follow.

In any event, as noted above, the industry has promulgated surveillance standards for packet-mode communications that, unless challenged, constitute a safe harbor under CALEA. CTIA understands that the major wireless carriers already have begun the process of implementing these standards. We do not understand the Petition to be seeking to invalidate the standards, or to be proposing alternatives. What then would Petitioners have the industry deploy in the next 15 months? As we describe below, the industry standard is robust and comprehensive.[12]

Finally, in an effort to future-proof CALEA, the Petition seeks to establish a procedure whereby the Commission would review and approve deployment of new technologies and prohibit such deployment without an embedded CALEA solution. Congress specifically rejected the notion that the government has any role in dictating the design of systems or that new technologies would be barred from deployment if they could not be wiretapped. And once deployed, the Petition would require ratepayers to bear the cost even though the Commission already has determined that the cost of CALEA hardware and software could be included in the reasonable costs service providers charge Law Enforcement for implementing electronic surveillance. Each of these efforts should be rejected as outside CALEA.

Commission has no leeway to decide otherwise, whether or not it perceives changes to be in the public interest. Only Congress can change the law.

[12] Some carriers may choose not to implement the standard if the services it would apply to are deemed information services. But that is the consequence of CALEA. Law Enforcement still has the opportunity to put the solution in place by appropriating funds to do so or negotiating payment over time on an amortized basis per each court order. Yet the Petition asks the Commission to reject this option and for customers alone to bear the cost. This is not consistent with CALEA or the reimbursement provisions of the wiretap laws.

I. INFORMATION SERVICES ARE EXEMPT FROM CALEA

A. Putting CALEA in Perspective

CALEA was a compromise. It balanced Law Enforcement's needs, customer privacy, and carrier burdens to create a careful framework for electronic surveillance in telecommunications networks. It was intended "to preserve a narrowly focused capability. . . to carry out properly authorized intercepts," but also "to protect privacy in the face of increasingly powerful and personally revealing technologies; and . . . to avoid impeding the development of new communications services and technologies."[13] It was not intended to reach *all* forms of communications, or even most, contrary to the arguments advanced in the Petition.[14]

The list of exempt services identified or referenced by Congress is actually quite long:

- Information services;
- Internet service providers or services such as Prodigy and America-On-Line
- Electronic messaging services, which are software-based services that enable the sharing of data, images, sound, writing, or other information among computing devices controlled by the senders or recipients of the messages;
- Electronic publishing;
- Private networks, PBXs;
- Automated teller machine networks and other such closed networks; and
- Interexchange services used to interconnect carriers.

The comments of former FBI Director Freeh during the Joint Hearings before the House and Senate prior to the passage of CALEA further underscore the point that CALEA does not reach all services:

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[13] H.R. Rep. No. 103-827(I), at 13, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3493 ("*House Report*").

[14] *See e.g.,* Petition at 4, 15 ("[T]he deliberate breadth with which Congress framed the statute in order to ensure that law enforcement is able to perform critical electronic surveillance.").

> Director Freeh: We have exempted, as we have discussed, a segment, a fairly significant segment, of the evolving telecommunications industry. We are really talking about phone-to-phone conversations which travel over a telecommunications network in whole or part. That is the arena of criminal opportunity that we are discussing.
>
> Senator Pressler: What other portions of the information superhighway could people communicate with the new technology that there is not now a means of listening in or following?
>
> Director Freeh: From what I understand. . . communications between private computers, PC-PC communications, not utilizing a telecommunications common net, would be one vast arena, the Internet system, many of the private communications systems which are evolving. Those we are not going to be on by the design of this legislation.
>
> Senator Pressler: Are you seeking to be able to access those communications also in some other legislation?
>
> Director Freeh: No, we are not. We are satisfied with this bill. I think it delimits the most important area and also makes for the consensus, which I think it pretty much has at this point.[15]\

Director Freeh's testimony confirms that CALEA was not intended to reach private communications systems, the Internet or other information services, and if new technologies ever necessitated a change in scope, Congress was the place to seek the solution. Treating "broadband access" otherwise, as the Petition urges, would sweep in to CALEA all universities and schools that provide such Internet access, likewise libraries, hotels, and WiFi "hotspots" in public access areas, as well as private businesses. The legislative history of CALEA does not support such a broad reading.

The hallmark of a covered telecommunications service under CALEA is the interconnection of that service to the PSTN. As Congress explained: "Thus, a carrier

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[15] Joint Hearings before the Subcommittee on Technology and the Law of the Senate Judiciary Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on H.R. 4922 and S. 2375, "Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services," Testimony of Federal Bureau of Investigations Director Freeh, at 203 (August 11, 1994).

providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements."[16] Indeed, Congress went on to explain, "[t]he only entities required to comply with the [assistance capability] requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have served most of their surveillance orders."[17]

Thus, Law Enforcement retains the ability to wiretap the PSTN, all of the dialup Internet connectivity or "narrowband" communications that go through the local carrier's network, and all of the electronic communications such as faxes that are sent over phone lines. But "always on" broadband access to the Internet simply is not part of CALEA. Congress underscored this point with the passage of the USA PATRIOT Act, which on the one hand, essentially codified the use of Carnivore and similar packet sniffing devices by Law Enforcement while on the other hand prohibited the government from imposing any new technical requirements or obligations on service providers. Section 222 of the USA PATRIOT Act states:

> Nothing in this Act shall impose any additional technical obligation or requirement on a provider of a wire or electronic communication service or other person to furnish facilities or technical assistance. A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to section 216 [pen register authority] shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance.[18]

Had CALEA applied to the Internet or broadband access, one would have expected either Law Enforcement in promoting the USA PATRIOT Act, or Congress in passing it, to have set a date certain for carriers to provide Internet pen registers. The failure to do so is

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[16] *House Report* at 3503.

[17] *Id.* at 3498.

[18] P. L. No. 107-56, 107th Cong., 1st Sess. (2001).

firm evidence that Congress did not understand CALEA to apply to such information services as Internet access.

B. The Information Services Exemption

While the above historical perspective clearly demonstrates that CALEA was not intended to reach all communications networks, particularly the Internet, the statute itself cannot be read as the Petition suggests. The Petition is predicated on the incorrect notion that once an entity is deemed to be a telecommunications carrier, it has CALEA obligations.[19]

First, CALEA imposes capability obligations only on "telecommunications carriers."[20] A telecommunications carrier is expressly defined in CALEA as follows:

> (A) a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and
>
> (B) includes—
>
> (i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or
>
> (ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title [47 USCS §§ 1001 et seq.][21]

The Petitioners urge the Commission to find broadband access to be a substitute for local exchange service and contend that such service need not even be provided by a common carrier for hire to be subject to CALEA, but they gloss over how the clear

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[19] *See* Petition at 9-15.

[20] 47 U.S.C. § 1002(a) ("a telecommunications carrier shall ensure…").

exemption written into the law for information services should be applied. While it might be an interesting academic argument to discuss what Congress meant by the terms "replacement for local exchange service" and whether a non-common carrier service can ever constitute such a thing, it is not necessary to do so in this proceeding because any person or entity – whether or not a telecommunications carrier – is exempt from CALEA "insofar as they are engaged in providing information services."[22] Thus, the Commission must determine what is an information service.

To that end, CALEA defines an information service as:

> (A) the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
>
> (B) includes—
>
> (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
> (ii) electronic publishing; and
> (iii) electronic messaging services.[23]

1. The 1994 Understanding of Information Services

By the time CALEA became law in 1994, the term "information services" had a long pedigree. Rather than summarize its history, we simply point to the Commission's own historical review of the term:

> The term "information service" follows from a distinction the Commission drew in the *First, Second, and Third Computer Inquiries*. That distinction was between basic data transmission service on the one hand and, on the other, a combination of that transmission and computer-mediated offerings. That combination produces "enhanced" or information services. This distinction was incorporated into the

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[21] 47 U.S.C. § 1001(8).

[22] *Id.*

[23] 47 U.S.C. § 1001(6).

> Modification of Final Judgment, which governed the BOCs after the Bell System break-up, and into the 1996 Act.[24]

Congress relied on the Commission's long-standing definition of information services and incorporated the term into the Telecommunications Act of 1996.[25] In its *Second Report and Order* regarding CALEA in 1999, the Commission reaffirmed the definition of information services and found that it was mutually exclusive of the definition of telecommunication services under CALEA:

> [T]he categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so.[26]

The Commission concluded that the Telecommunications Act of 1996 did not alter the meaning of or distinction between telecommunications carriers and information services:

> We also conclude that CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the 1996 Act, and that the CALEA definitions therefore remain in force for purposes of CALEA. The pertinent sections of CALEA are not part of the Communications Act.[27]

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[24] *Broadband Access NPRM* ¶ 18 n38 (citations omitted).

[25] 47 U.S.C. § 153(20).

[26] *Second Report and Order* ¶¶ 27 n.70, quoting Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11520 (1998).

[27] *Second Report and Order* ¶ 13 ((citation omitted).

Oddly, to read the Petition, one would conclude that the Telecommunications Act of 1996 came first and CALEA was passed later to create specific, surveillance related definitions of the key terms. To the contrary, Congress is presumed to know about the Commission's prior interpretation and application of these terms and to have intended the well-understood meaning when using them in the statute.[28]

To the extent that there is any ambiguity in CALEA, the Commission need only review the legislative history to resolve whether the Internet, Internet access, and electronic messaging are exempted services whether or not provided by a telecommunications carrier.[29] To that end, the legislative history of the statute makes clear that Internet service providers and all electronic messaging services are exempt:

> The definition of telecommunications carrier does not include persons or entities to the extent that they are engaged in providing information services, such as electronic mail providers, on-line service providers,

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[28] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988) (Supreme Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to legislation it enacts."); *United States v. Wilson*, 290 F.3d 347, 357 (D.C. Cir. 2002) (In enacting legislation, "Congress is presumed to be aware of established practices and authoritative interpretations of the coordinate branches."). Indeed, by way of history, the version of the Telecommunications Act passed by the House included a definition of "information services" clearly based on the definition of that term in the MFJ and CALEA: "(41) INFORMATION SERVICE. – The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." Congressional Record, Vol. 141, No., 129, Communications Act of 1995, at H8443 (Aug. 4, 1995). The House version of the bill also included a definition of "telecommunications service" which preserved the distinction between "telecommunications" and "information services": "(49) TELECOMMUNICATIONS SERVICE. – The term 'telecommunications service' means the offering, on a common carrier basis, of telecommunications facilities, or of telecommunications by means of such facilities. Such term does not include an information service." *Id.*

[29] *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

> such as Compuserve, Prodigy, America-On-line or Mead Data, or Internet service providers.[30]

Finally, CALEA did "not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet."[31] Rather than future-proofing CALEA against technological changes, Congress future-proofed information services, stating that it intended "to anticipate the rapid development of advanced software and include such software services in the definition of information services."[32]

2. The Commission is on the Right Track in Defining Information Services Today

The Commission has undertaken a careful and thoughtful evaluation of which services fall outside the Title II classification over the past decade.[33] During the Broadband Proceedings, the Commission recognized Internet access and connectivity, alone or in combination with other applications, to be information services.[34] For example, from the *Cable Modem Inquiry*:

> We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. As currently

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[30] *House Report* at 3500.

[31] *Id.* at 3503.

[32] *Id.* at 3501.

[33] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, 13 FCC Rcd 15280, 15308-11 ¶¶ 77-82 (1998). *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2449 ¶¶ 100-01 (1999).

[34] *See Broadband Access NPRM* ¶ 17; *Cable Modem Inquiry* ¶ 38.

> provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS. Accordingly, we find that cable modem service, an Internet access service, is an information service. This is so regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service. As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.[35]
>
> Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet. At the most basic level, these functions include establishing a physical connection between the cable system and the Internet by operating or interconnecting with Internet backbone facilities. In addition, these functions may include protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching.[36]

The Commission came to a similar conclusion with regard to wireline broadband Internet access services in the *Broadband Access NPRM*. Here again, the Commission's views on information services are consistent with Congress' understanding of the term:

> [W]e tentatively conclude that, as a matter of statutory interpretation, the provision of wireline broadband Internet access service is an information service. Specifically, we tentatively conclude that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the Act. In addition, we tentatively conclude that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service."[37]

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[35] *Cable Modem Inquiry* ¶ 38.

[36] *Id.* ¶ 17.

[37] *Broadband Access NPRM* ¶ 17.

The Commission noted further that it "base[d] this tentative conclusion on the fact that providers of wireline broadband Internet access provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition."[38]

Most recently, in the *pulver.*com decision, the Commission concluded that a voice-over-Internet-protocol application known as Free World Dialup – a service that does not use the PSTN – is an information service:[39]

> The fact that the information service Pulver is offering happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service.[40]

The Commission's prior decisions inform the definition of information services and therefore the scope of the exemption in CALEA. CTIA agrees that with law enforcement that a rulemaking to clarify how that definition should be applied to CALEA is timely. But it does not support law enforcement's request that the Commission issue a declaratory ruling – in advance of that rulemaking – which categorically declares all Internet services as subject to CALEA. The Commission should continue on its course, which now encompasses the regulatory treatment of IP-enabled communications, remain true to the CALEA statutory mandate, and let Congress adjust the regulatory framework as necessary to achieve public policy goals.

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[38] *Id.* ¶ 20.

[39] *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, FCC 04-27, WC Docket No. 03-45, Memorandum Opinion and Order, ¶ 11 (rel. Feb. 19, 2004).

[40] *Id.* ¶ 12.

II. CALEA ESTABLISHES THE APPROPRIATE BENCHMARKS FOR COMPLIANCE AND THE FRAMEWORK FOR DEALING WITH NONCOMPLIANCE

CALEA establishes appropriate benchmarks and standards for compliance and a framework for dealing with noncompliance. The procedures proposed in the Petition have no grounding in the statute and are untenable. Moreover, industry's voluntary development of standards for packet-mode communications belies the need for the procedures requested in the Petition.

Much of the perceived delay in dealing with surveillance solutions for packet-mode communications is the result of uncertainty in what constitutes an exempt information service, not bad faith or intentional delay on the part of carriers. Law Enforcement itself established a flexible deployment plan to address packet-mode communications and the major wireless carriers have worked with Law Enforcement to explain their future deployments and plans to implement industry standardized packet surveillance solutions. CTIA rejects strongly any suggestion that its members have been laggards or uncooperative.

A. The Commission Lacks the Authority Sought in the Petition to Create an E911 Process for CALEA

Under the Supreme Court's landmark decision in *Chevron*, an agency's construction of a statutory provision it is responsible to implement is binding if it is a "permissible construction of the statute."[41] It is a "permissible construction" unless Congress has "unambiguously" addressed the "precise question" in a manner inconsistent with the agency's construction. If Congress has resolved a policy dispute in the process of enacting a statute, an agency or court can, and must, adopt Congress's resolution.[42]

The Commission has no authority under *Chevron* to rewrite CALEA as requested in the Petition because Congress already has unambiguously addressed the precise questions

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[41] *See Chevron*, 467 U.S. at 842-843 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218 (2001).

[42] *Chevron* at 844-845.

raised, including the standards for extensions and enforcement procedures. Adopting the procedures requested in the Petition turns the statute on its head by substituting the Commission for the courts, creating new standards for extensions, ignoring existing industry safe harbors, creating new penalties that Congress did not authorize or contemplate, and assuming all compliance is reasonably achievable by all service providers regardless of cost or its impact on users' privacy rights.

First, extensions certainly will be needed and warranted if CALEA is now deemed to apply to information services. CALEA itself contains the standard for such extensions, and it is not the "extraordinary circumstances" test described in the Petition.[43] Instead, the extension process and standard is governed by Section 107(c):

The Commission may, after consultation with the Attorney General, grant an extension under this subsection, if the Commission determines that compliance with the assistance capability requirements under section 1002 of this title is not reasonably achievable through application of technology available within the compliance period.[44]

It is not for the Commission to decide whether technology *should have been available*, but rather, whether compliance is reasonably achievable with available technology. If not, an extension for up to two years must be granted. If the government believes that a carrier is not in compliance, CALEA permits a court, not the Commission, to make that determination in the first instance and to set whatever penalties may be appropriate to achieve compliance. Under Section 108, a court may only issue an enforcement order if it finds that,

> (1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and (2) compliance with the requirements of this title is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.[45]

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[43] Petition at 50.

[44] 47 U.S.C. § 1006(c)(2).

[45] *Id.* § 1007(a).

The enforcement order must specify a reasonable time and conditions for compliance and is limited by (i) the capacity of the carrier, (ii) whether compliance with assistance capability requirements is reasonably achievable and (iii) whether the equipment, facility or service was deployed before January 1, 1995 without payment by the government of the reasonable costs to upgrade the equipment.[46]

Under the Petition's plan, all "violations" (*i.e.,* a failure to meet packet-mode compliance deadlines) would be referred to Commission's Enforcement Bureau and subject to Commission penalty structure.[47] "Penalties could include imposition of any directives to the carrier intended to facilitate CALEA packet-mode compliance that may be warranted under the circumstances and/or monetary forfeitures."[48] The proposal is clearly in conflict with the enforcement scheme written into CALEA by Congress.[49]

B. Industry Standards have been Developed to Provide Packet-Mode Interception Capabilities

To ensure efficient and uniform implementation of CALEA's surveillance assistance requirements without impeding technological innovation, CALEA permits the telecommunications industry, in the first instance, to develop technical standards for meeting the required surveillance capabilities.[50] In the case of packet-mode communications, this has been done, and the standard was reviewed and approved by the Commission and Court of Appeals. The industry has just refined the standard to keep pace with technology.

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[46] *Id.* § 1007(b),(c).

[47] Petition at 43 n. 72.

[48] *Id*.

[49] CTIA does not address in detail the remaining benchmarking process proposed in the Petition. Our record of cooperation is unparalleled and we are proud of it. There is no predicate that justifies imposing these requirements on carriers and their executives.

[50] 47 U.S.C. § 1002(b)(1).

The industry's core standard was published in December 1997 under the aegis of the Telecommunications Industry Association ("TIA"), an accredited standard-setting body -- Interim Standard/Trial Use Standard J-STD-025. The "J-Standard" included provisions for the interception of packet-mode communications in two ways. First, for low volume packet cases such as wireless short message service ("SMS"), the standard included a packet envelope message with appropriate identifying information. For higher volume, the standard permitted delivery of the entire packet stream to Law Enforcement and did not require the carrier to separate content and communications identifying information.

In 2000, the U.S. Court of Appeals for the D.C. Circuit upheld the J-Standard packet-mode data requirements as adopted by the Commission.[51] Thus, under the standard, Law Enforcement today receives SMS (electronic messaging, which falls squarely within the definition of information services and therefore is exempt under CALEA) on the call data channel with every wiretap order.

Concerned about the privacy implications of complying with J-STD-025, the Commission invited TIA to report on "steps that can be taken . . . that will better address privacy concerns" raised by lawfully authorized surveillance of packet-mode communications.[52] Industry convened a series of Joint Experts Meetings ("JEM") to determine the feasibility of separating the content of a packet from the information identifying the origin, destination, termination and direction of it. The final JEM Report was submitted to the Commission on September 29, 2000.

Just prior to submitting the JEM Report, the Court of Appeals rendered its decision upholding J-STD-025 as a safe harbor.[53] The Commission's *Order on Remand* recognized

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[51] *See United States Telecom. Ass'n. v. FCC*, 227 F.3d 450 (D.C. Cir. 2000); *see also In the Matter of Communications Assistance for Law Enforcement Act,* Third Report and Order, 14 FCC Rcd 16794 (rel. Aug. 31, 1999).

[52] *In the Matter of Communications Assistance for Law Enforcement Act,* Third Report and Order, 14 FCC Rcd 16794, ¶ 55 (rel. Aug. 31, 1999).

[53] *See United States Telecom. Ass'n.*, 227 F.3d at 450.

the safe harbor status of the packet mode solution in J-STD-025 and set a new compliance date.[54] While one might argue that industry had no reason to go further, Committee TR-45, under the auspices of TIA, convened the Lawfully Authorized Electronic Surveillance ad hoc committee to implement, in essence, the recommendation of the JEM Report in a Revision B of the standard.

Interestingly, J-STD-025-B follows a "transport-based" approach rather than a "services" approach. The standards group did not attempt to dictate which services and/or platforms CALEA applied to, but rather provided the specifications necessary for a given technology to provide information to Law Enforcement in a standardized way for systems ultimately determined to be covered by CALEA. In other words, Law Enforcement received the benefit of an approach that treated all services essentially as a telecommunications service for purposes of setting standards for interception even though none of the services under discussion are currently deployed as telecommunications services.

J-STD-025-B was approved for publication as a TIA Standard/T1 (ATIS) Trial-Use standard in December 2003, pending editorial review, and has now been published. TR-45 approved J-STD-025-B for a 60-day ballot under ANSI to become a final standard. The balloting for ATIS (T1) closed on April 14, 2004 and the TIA balloting will close on May 7, 2004. As the Commission may know, Law Enforcement withdrew from the standards process last year and voted against publication of the standard.

The Petition characterizes the standard as "deficient"[55] without providing any explanation to the Commission for the claimed deficiency. The standard speaks for itself and under CALEA is a safe harbor unless challenged and a deficiency is found by the Commission.

TR45 also approved at its June 2003 meeting another standards project for next generation networks, which will be known as Revision C to the Joint Standard. This version

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[54] *In the Matter of Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd 6896 (rel. April 11, 2002) ("*Order on Remand*").

[55] Petition at 35.

will improve on Revision B as needed and address requests by Law Enforcement for information related to multi-media and other information services. The Revision will address Law Enforcement's so-called Packet Surveillance Fundamental Needs Document ("PSFND"), Electronic Surveillance Needs for Carrier-Grade Voice over Packet Service ("CGVoP"), and prior Law Enforcement contributions to the standards group. Possible features may include surveillance status messages, continuity check tone, feature status, non-communication signaling for information services, location tracking, call release information and number portability considerations. The work is ongoing and is expected to be completed in early 2005.

All of these developments demonstrate the good faith efforts of the industry to develop solutions for Law Enforcement in packet networks. That Law Enforcement wants more is understandable; but short of requiring the *access* provider to determine the applications being run by a particular user, the service provider will never know most of the information being sought by Law Enforcement. When the service provider also provides the communications management service in addition to the transport, then more information is available and provided to Law Enforcement. Significantly, neither law enforcement nor anyone else, has suggested any lawful or technically feasible way to require the access provider to invade the content of the packet and sift through it to find the information of interest to Law Enforcement. Instead, just as they do today with dialup Internet access or faxes traversing the PSTN, the service provider would provide the entire packet stream under the core standard and leave it to Law Enforcement to conduct the search.

III. THE COMMISSION MUST REJECT THE PETITION'S PROPOSED ADVANCED DETERMINATION OF CALEA COMPLIANCE BEFORE DEPLOYMENT OF NEW TECHNOLOGIES

The Petition seeks rules that will require carriers to seek an advance determination of whether a service is covered by CALEA and to "obtain a Commission determination prior to

service roll-out."[56] Ironically, the Commission has had several such petitions before it since 2001 without any determination.[57] One such petition sought a determination that general packet radio services ("GPRS") were information services. This very circumstance underscores the general impracticality of the proposal. If the Petition rules were in place, GPRS would still be on the drawing board and customers would still be waiting to enjoy the benefits of wireless broadband service.

Further, Section 103(b) limits the government's involvement in the design of new technologies:

> **(1) Design of features and systems configurations.** This title does not authorize any law enforcement agency or officer—
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> (A) to require any specific design of equipment, facilities, services, features, or system configurations to be adopted by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services; or
>
> (B) to prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.

Congress spoke directly to this point in the legislative history of CALEA as well:

> Courts may order compliance and may bar the introduction of technology, but only if law enforcement has no other means reasonably available to conduct interception and if compliance with the standards is reasonably achievable through application of available technology. This means that if a service or technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed. This is

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[56] *Id.* at 54.

[57] Under section 109 of CALEA, carriers are permitted to petition the Commission for a determination regarding whether compliance with the assistance capability requirements is "reasonably achievable" with respect to any equipment, facility, or service installed or deployed after January 1, 1995. 47 U.S.C. § 1006(c).

> the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped. One factor to be considered when determining whether compliance is reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing or acquiring and deploying the feature or service in question.[58]

Finally, Congress wanted to ensure that CALEA would not be an impediment to the development and deployment new technologies. The legislative history could not be any clearer on this point:

> The Committee's intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies. The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies.[59]

In the end, the Commission cannot rely on its general powers under the Communications Act to do what Congress prohibited or designed in CALEA. The Commission cannot undo what Congress has done in CALEA by reference to its ancillary authority under Title I of the Communications Act.[60] Nor can the Commission rely on Section 229 because it is a grant of rulemaking authority consistent only with the limited powers granted under CALEA.[61]

In any event, the proposed plan is unnecessary as the Commission continues to address the definition of information services in its broadband inquiries. Coupled with the

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[58] *House Report* at 3499.

[59] *Id.*

[60] 47 U.S.C. § 151; *see Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (holding Title I not a source of delegated authority for the Commission to promulgate video description rules because it confers power to ensure U.S. citizens have access to radio and wire transmissions, not to regulate content or other purposes.).

[61] 47 U.S.C. § 229.

continued development of voluntary standards for packet-mode communications, CTIA sees no need for the extraordinary procedure proposed in the Petition.

IV. THE ATTEMPTED RECONSIDERATION OF THE COMMISSION'S PRIOR ORDER ON COST RECOVERY IS UNTIMELY

In its 2002 *Order on Remand,* the Commission determined that certain assistance capability requirements under CALEA could be implemented by cost-effective methods because carriers could recover "at least a portion of their CALEA software and hardware costs by charging to [Law Enforcement] for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order."[62] The Petition now seeks, in effect, an untimely reconsideration of this determination, claiming that the Commission lacked authority to consider this issue as part of its determination despite the statutory mandate that any solution must be cost-effective.

Section 1.429 of the Commission's rules governs the filing of petitions for reconsideration of a final decision in a rulemaking proceeding.[63] Petitions for reconsideration "shall be filed within 30 days from the date of public notice of such action."[64] The *Order on Remand* was placed on public notice on April 11, 2002.[65] Therefore, petitions for reconsideration of the order were due by May 11, 2002. Petitioners

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[62] *See Order on Remand* ¶ 60.

[63] 47 C.F.R. § 1.429; *see also* 47 U.S.C. § 405.

[64] *Id.* § 1.429(d); *see also In the Matter of Association of College and University telecommunications Administrators, American Council on Education, and National Association of College and University Business Officers*, 8 FCC Rcd. 1781 (1993).

[65] *See* Federal Communications Commission Daily Digest, Vol. 21, No. 70 (April 11, 2002), *available at* 2002 WL 535966.

did not file a petition for reconsideration at that time.[66] Accordingly, Petitioners are precluded from challenging the *Order on Remand* here.

In addition to the procedural infirmity, the Petition is wrong on the merits. Under federal law, and under most state wiretap statutes, carriers are permitted to recover the expenses incurred in providing the technical assistance to conduct the wiretap.[67] But, the Petition laments, "nothing in Title III or CALEA authorizes carriers to include in such provisioning costs their CALEA implementation costs."[68] CTIA responds that nowhere in Title III or CALEA does it mention so-called "provisioning costs" nor do these laws limit the category of costs carriers are entitled to recover other than by imposing a reasonableness standard. Moreover, whether an expense is reasonable is a matter for a court to decide under federal law or the analogous state law.

CALEA provides that any surveillance capabilities imposed on carriers must be cost-effective, and the Commission's conclusion that the punch list was cost-effective was based on a belief that carriers' could recover a portion of their costs from Law Enforcement. The Commission cannot now reverse its determination that Law Enforcement should be responsible for at least a portion of carriers' compliance costs because it is far too late to reopen the prior proceeding to determine if the CALEA requirements could be sustained as being "cost effective" if the costs Law Enforcement is now challenging were to be borne solely by carriers and their end user customers. No doubt Law Enforcement is right when it

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[66] One party, the Rural Cellular Association, filed a petition for reconsideration of the *Order on Remand* to challenge the June 30, 2002 deadline to provide six "punch list" electronic surveillance capabilities. *See In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Petition for Reconsideration of the Rural Cellular Association (dated June 3, 2002). That petition was apparently filed after the 30-day deadline set out in 47 C.F.R. § 1.429(d).

[67] *See* 18 U.S.C. § 2518(4) ("Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for **reasonable expenses incurred** in providing such facilities or assistance.")(emphasis added).

[68] Petition at 68.

says that wiretap costs have increased after CALEA. Carrier costs have increased dramatically too. Lest the Commission forget, it imposed on carriers a duty to provide 7x24x365 security office coverage to assist Law Enforcement in conducting timely surveillance.[69] And Law Enforcement's implementation of CALEA has dramatically increased the demand on carriers to provide technical assistance because the government itself has not standardized its own collection equipment. Carriers are expected to work with multiple vendors, to provision multiple agencies, and to support the inherent troubleshooting caused by poorly trained operators of the collection equipment.

CTIA is informed that some carriers include the cost of CALEA hardware and software and delivery capabilities in the cost of each order, just as they include the capital and other costs of running a security office around the clock. Those that do include CALEA-related hardware, we are told, amortize the recovery of costs over 7-10 years to reduce the burden on the government. While the Petition complains that smaller Law Enforcement agencies cannot afford to pay a carrier's reasonable expenses incurred in wiretapping, the Petition is silent on the burden imposed on smaller carriers in responding to such requests.[70] The Petition offers no assistance to the small or rural carrier that has never been called upon to initiate a wiretap yet must implement CALEA for its telecommunications services, and if Petitioners have their way, for all future information services as well.

CONCLUSION

For all of the reasons discussed above, CTIA urges the Commission to reject the declaratory relief and the proposed implementation plan requested by the Petition. By doing so, Law Enforcement will not be without solutions or tools. As noted above, the industry has

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[69] *See In the Matter of Communications Assistance for Law Enforcement Act*, Report and Order, 14 FCC Rcd. 4151 (1999).

[70] The Petition seeks rules that would place small and rural carriers at a competitive disadvantage by requiring them to recover their costs from their smaller customer base. Powerful scale economies apply to CALEA implementation, as illustrated by the

developed standardized solutions for packet-mode communications and the federal government itself has packet surveillance tools such as Carnivore. The wireless industry has been cooperative and responsive to the needs of Law Enforcement and will remain so.

Respectfully submitted,

Albert Gidari
Perkins Coie LLP
505 Fifth Avenue South
Suite 620
Seattle, WA 98104
(206) 359-8688

Michael F. Altschul
Senior Vice President, General Counsel
CELLULAR TELECOMMUNICATIONS
AND INTERNET ASSOCIATION

1400 16th Street, N.W.,
Suite 600
Washington, D.C. 20036
(202) 785-0081

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government's own purchase and flexible deployment of the initial J-STD-025 capabilities for grand-fathered equipment.